

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

OWNERS AND NEIGHBORS, et al.
(COEN III),

Petitioners,

v.

CITY OF MERCER ISLAND,

Respondent,

and

STROUM JEWISH COMMUNITY CENTER,
FRENCH AMERICAN SCHOOL OF PUGET
SOUND, HERZL-NER TAMID
CONSERVATIVE CONGREGATION, AND
MERCER ISLAND CENTER FOR THE
ARTS,

Intervenors.

CASE No. 19-3-0003c

ORDER FINDING COMPLIANCE

I. INTRODUCTION

On August 5, 2019, the Board issued its Final Decision and Order (FDO) in this case. The Board ruled that the adoption of Ordinance 18C-14 a legislative action which rezoned property and changed the Future Land Use Map (FLUM), resulted in an inconsistency between the City's comprehensive plan and its development regulations in violation of RCW 36.70A.040, as charged by the Petitioners in Issue 15. The Board further found that the City failed to comply with RCW 36.70A.040 when it adopted Ordinance 18-13, Amendments 1 – 8, because the City's existing development regulations did not implement the new

1 “Community Facilities” designation (Issue 25).

2 **February Compliance Hearing:** The Board conducted a telephonic compliance
3 hearing on February 11, 2020. After reviewing the City’s compliance actions and Petitioner’s
4 objections, the Board found that the City had taken action to comply with the Board’s order
5 as to Issue 15 through the adoption of Ordinance 19C-19, reversing the impacts of
6 Ordinance 18C-14. The Board found the City in compliance as to that issue. The Board also
7 found that the City had not taken action to comply with the Board’s order as it pertains to
8 Issue 25, relating to Ordinance 18-13.
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10 To address the Board’s decision on Issue 25, the Mercer Island City Council referred
11 the subject to the Mercer Island Planning Commission, asking it for a recommendation for
12 further action, whether to adopt implementing development regulations or to abandon the
13 “Community Facilities” designation created in Ordinance 18-13. The Planning Commission
14 had discussed the matter but no recommendation for action by the City Council had been
15 taken. In its initial compliance filings, the City had acknowledged that it remained
16 noncompliant with RCW 36.70A.040 as pertains to Ordinance 18-13 and requested a new
17 compliance schedule.¹ The Petitioners objected to the request.²
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19 At the Board’s February 11, 2020, hearing, the City attorney verbally acknowledged
20 noncompliance but reported that the Planning Commission would be forwarding a
21 recommendation to the City Council for repeal of Amendment 8 and a portion of Amendment
22 1, the parts of Ordinance 18-13 that pertained to the establishment of a “Community Facility”
23 designation for action at the next City Council meeting, February 18, 2020. As a result of
24 this statement by the City’s attorney, the Board set its calendar for further review based on
25 the assumption that the City would achieve compliance very quickly and that an extended
26 compliance calendar would not be necessary.³
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¹ City of Mercer Island’s Statement of Action Taken to Comply (January 14, 2020) at 3.

² Neighbors’ Objections to City’s Statement of Actions Taken to Comply (January 24, 2020).

³ The original compliance hearing was set for March 4, 2020, but due to the unavailability of a Board member and other scheduling challenges, was reset to March 17, 2020.

March Compliance Hearing: On March 17, 2020, the Board conducted a telephonic compliance hearing in this matter. Board members Bill Hinkle and Cheryl Pflug attended the hearing. Deb Eddy convened the hearing as the Presiding Officer. Interim City Attorney Bio Park represented the City of Mercer Island; Alex Sidles represented Petitioners Owners and Neighbors. Dan Thompson represented Petitioner Marc Coen. The substance of that hearing, and the Board's findings and conclusions as a result of it, are set out below.

II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.⁴ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.⁵ For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.⁶

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."⁷ Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.⁸ Thus, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that **any action** taken by the City is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act).⁹

⁴ RCW 36.70A.300(3)(b).

⁵ RCW 36.70A.330(1) and (2).

⁶ RCW 36.70A.320(1), (2), and (3).

⁷ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁸ RCW 36.70A.3201.

⁹ RCW 36.70A.320(2).

III. DISCUSSION

Action Taken to Comply

The City filed an amended compliance index prior to the March 17 hearing, memorializing the passage of Ordinance 20-04 together with its staff report and presentation to the City Council.¹⁰ The Ordinance repealed those portions of the 2018 Comprehensive Plan amendments related to the Community Facility Zone, and recognizes that the action is being taken to address the inconsistencies identified by this Board. The pertinent sections read:

Section 1. Repeal of Amendments Related to Community Facility in Attachment A of Ordinance No. 18-13. Amendments related to Community Facility in Attachment A of Ordinance No. 18-13 are repealed as set forth in Attachment A to this ordinance.

Section 2. Repeal of Amendments Related to Community Facility in Amendment 1 in Attachment B of Ordinance No. 18-13. Amendments related to the Community Facility in Amendment 1 of Attachment B of Ordinance No. 18-13 are repealed as set forth in Attachment B to this ordinance.

Section 3. Repeal of Amendment 8 in Attachment B of Ordinance 18-13. The amendments adopted in Amendment 8 of Attachment B of Ordinance No. 18-13 are repealed.

Attachment A is the Mercer Island Land Use Plan, their label for their Future Land Use Map (FLUM). Amendment 1 in Attachment B is the land use designation table.

Petitioners "Neighbors" filed an objection noting that the land use map attached to the compliance ordinance contained an error and requesting that, until that error is corrected, the Board decline to find the City in compliance and instruct the City to correct the error.¹¹ "If the City corrects the map, then Neighbors agree the City will be in compliance with the Board's order."¹²

¹⁰ City of Mercer Island First Amended Compliance Index (February 28, 2020).

¹¹ Neighbors' Objections to City's First Amended Compliance Index (March 3, 2020).

¹² *Id.* at 3.

1 Petitioner Coen also filed an objection, but requested that the Board order the City to
2 re-note and re-adopt Ordinance 20-04 with the correct land use map, transmit its findings of
3 noncompliance to the governor, and recommend that sanctions be imposed “for the
4 unnecessary fees and costs petitioners have incurred in these compliance proceedings.”¹³

5 At the telephonic compliance hearing, the City argued that the text of Ordinance 20-
6 04 repeals the noncompliant action and returns the City’s land use designations to the
7 *status quo ante*; but a “scrivener’s error” resulted in an incorrect legend on the Land Use
8 Map as Attachment A to Ordinance 20-04. The City also explained that the Ordinance
9 includes a section addressing potential scrivener’s errors:
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11 **Section 4. Publish Comprehensive Plan as Amended.** The City Council
12 authorized the Community Planning and Development Director and the City Clerk to
13 correct scrivener’s errors in Attachments A and B, effectuate the amendments in
14 Sections 1, 2 and 3 of this ordinance into the Mercer Island Comprehensive Plan,
15 and publish the amended document.

16 Thus it is the position of the City that a correction to the Land Use Map can be
17 accomplished by the City Clerk by asking Code Publishing Company to correct the City’s
18 website. At the hearing, the City’s attorney stated that communication with Code Publishing
19 Company had taken place to correct the scrivener’s error, but that it had not yet been
20 effectuated.¹⁴ Petitioner Neighbors restated their position that, with the correction of the land
21 use map, the City is in compliance.

22 Petitioner Coen argued that the land use map error was not a scrivener’s error, and
23 that in adopting a map that is inconsistent with returning the map to its *status quo ante* the
24 adoption of Ordinance 18-13, the City had secretly amended the land use map in Ordinance
25 20-04.¹⁵ Petitioner Coen requested that the Board invalidate Ordinance 20-04. Believing
26 that the governor could award costs to petitioners, Petitioner Coen also urged the Board to
27 recommend that sanctions be imposed by the governor.
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¹³ Petitioner Coen’s Response and Objection to City’s Statement of Compliance (March 6, 2020).

¹⁴ Statement by Bio Park, Interim City Attorney, during telephone compliance hearing March 17, 2020.

¹⁵ Petitioner Coen’s Response and Objection to Compliance (March 3, 2020) at 2.

1 **Subsequent filings**

2 On request of the Board,¹⁶ the City provided evidence of its efforts to correct the
3 scrivener's error.¹⁷ Included in email strings from March 6 and March 12 was an email
4 conveying a letter to the Code Publishing Company requesting that the error on the legend
5 appearing on land use map be corrected.¹⁸ By responding email, the president of Code
6 Publishing Company acknowledged receipt of the communication and indicated that they
7 would be working on this update.¹⁹
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9 However, Petitioner Coen filed a further objection to the Board complaining that the
10 (arguably) correct map sent to Code Publishing Company by the City is still incorrect.
11 Comparing the map in exhibit 261 to the map *status quo ante* adoption of Ordinance 18C-
12 14,²⁰ the Board agrees that the "corrected" map sent to Code Publishing Company to reflect
13 the actions taken in Ordinance 20-04²¹ is not identical to the Map adopted in Ordinance 17-
14 23 in all respects. The map does reflect the repeal of the Community Facilities Zone (CFZ)
15 which is the subject of this case, and returns those properties to the land use designation
16 set out in Ordinance 17-23. Without more information, the Board cannot ascertain whether
17 these are new scrivener's errors or new map amendments or changes to the prior FLUM
18 that were properly adopted in Ordinance 18-13 . Either way, they do not pertain to the
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28 ¹⁶ Email from Desiree Ortiz, Legal Assistant, to all parties to GMHB 19-3-0003c, March 18, 2020.

29 ¹⁷ Email from Mary Swan, Paralegal and Public Records Officer, City of Mercer Island, March 18, 2020,
30 including an updated Compliance Index with new records numbered 260 through 264.

31 ¹⁸ Index 260, 261.

32 ¹⁹ Index 264.

²⁰ Pursuant to WAC 242-03-640, the Board takes official notice of the Land Use Map adopted by Ordinance
No. 17-23 on December 5, 2017 (Petitioner Coen's Exhibit 7 attached to Coen's Response and Objection to
Compliance filed March 3, 2020). This map does provide the status quo ante for the properties subject to this
appeal.

²¹ Attachment to *Exhibit 261*.

1 instant challenge. To invoke the Board's jurisdiction as to those changes, a new Petition for
2 Review would be necessary.²²

3 The Board believes that the effect of the textual language in Ordinance 20-04 was to
4 repeal the inconsistent Community Facilities Zone designation adopted in Ordinance 18-13
5 and bring the City into compliance with RCW 36.70A.040.

6 The Board also agrees that Section 4 of the Ordinance sets out the City's authority to
7 correct scrivener's errors without further action by its legislative body. With the City's
8 submission on March 18, 2020, the Board is persuaded that the City is pursuing correction
9 of the error to the land use map as it pertains to the designation of the land that is the
10 subject of this challenge. Whether or not additional scrivener's errors now exist in the
11 corrected map sent to Code Publishing Company, the City's correction to the map reflects
12 the repeal of the Community Facilities designation (CFZ).

13 **The Board finds** that the text of Ordinance 20-04 repeals the "Community Facilities"
14 land use designation (CFZ), curing the inconsistency between the comprehensive plan and
15 the City's development regulations as regards the land that is the subject of this challenge.

16 **The Board finds** that by passage of Ordinance 20-04, the City has removed the
17 textual inconsistency identified in Issue 25 of this Board's FDO.

18 **The Board finds** that the City has the authority to effectuate correction of scrivener's
19 errors appearing on the land use map as described in Section 4 of the Ordinance.

20 IV. ORDER

21 Based upon review of the August 5, 2019, Final Decision and Order, the City of
22 Mercer Island's Statement of Actions Taken to Achieve Compliance and Ordinance No.20-
23 04, the Growth Management Act, prior Board orders and case law, having considered the
24 arguments of the parties offered in the briefing and at the compliance hearing, and having
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31 ²² [A] new PFR at the compliance phase may be appropriate if new issues arise or new petitioners appear
32 opposing the legislative action taken on remand. In these situations, a new index, record, clarification of the
issues and briefing schedule allow the parties to fully articulate their positions, and the Board has adequate
time to thoroughly deliberate and resolve the issues. *Hensley v. Snohomish County*, GMHB No. 03-3-0010
(Order on Motions, August 11, 2003) at 7.

1 deliberated on the matter, the Board finds that the City is in compliance with this Board's
2 FDO in this matter and this case is closed.

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4 SO ORDERED this 3rd day of April 2020.

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Deb Eddy, Board Member

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Cheryl Pflug, Board Member

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Bill Hinkle, Board Member

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17 **Note: This is a final decision and order of the Growth Management Hearings Board**
18 **issued pursuant to RCW 36.70A.300.²³**

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31 ²³ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
32 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved
by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in
RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the
parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not
authorized to provide legal advice.